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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969-70

PETITION NOT PRINTED No. [redacted]. 206

VIVEN HARRIS,

Petitioner,

vs.

THE STATE OF NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1022

VIVEN HARRIS,

Petitioner,

vs.

THE STATE OF NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Pursuant to the Revised Rules of this Court, Rule 24, the respondent submits this brief in oppositon to the captioned petition for a writ of certiorari.

Questions Presented

The following questions are presented by this appeal:

(1) Was the use of the petitioner's statement properly utilized to impeach his credibility when he testified in his own defense even though the statement would have been inadmissible on the prosecution's direct case?

(2) Are the petitioner's constitutional rights violated when he is not warned pursuant to the provisions of the New York Code of Criminal Procedure § 813-f, that the prosecutor intends to offer a confession or admission into evidence when the prosecutor has no such intention, although he later uses such admission to impeach the petitioner's credibility on cross-examination?

Statement of the Case

On the whole, the petitioner has presented to the Court a concise and accurate statement of the facts. Although we do not in every instance agree with the implications he draws from those facts, we will nevertheless be bound by the facts as he has set them forth.

POINT I

The use to which the petitioner's statement was put was eminently correct and proper.

The Court may decide in this case that *Walder* v. *United States,* 347 U. S. 62, is no longer good law. If it does, then, of course, the rationale of *People* v. *Kulis,* 18 N. Y. 2d 318, depending, as it does, on *Walder* will no longer be valid, and this case now before the Court is indefensible, because in its turn it depends completely on both *Walder* and *Kulis.* As a matter of fact, the New York Court of Appeals has adopted the phrase "the *Kulis-Walder* rule" to describe the principle, *People* v. *Miles,* 23 N. Y. 2d 527, 544. Our objective, then, must be to demonstrate to this Court that *Walder* is still a viable, worthwhile and functional rule of law.

In *Walder,* the defendant was arrested in 1950 and charged with the possession of heroin. The District Court, however, on an appropriate motion, held that the heroin

which formed the basis of the charge had been seized unlawfully and suppressed it. Thereafter, the Government moved for the dismissal of the case, and that was done. Almost two years later, he was again charged with violating the narcotics laws, and when the case went to trial he testified in his own defense. He testified that he had never purchased, sold, or possessed any narcotics, and over his attorney's objection the Government was permitted to cross-examine him about the heroin seized from him in 1950. In the face of his adamant denial that narcotics had been taken from him at that time, a denial squarely contradicted by his 1950 affidavit in support of the motion to suppress, the Government was permitted, again over objection, to elicit the testimony on rebuttal of one of the officers who had seized the narcotic in 1950 and the chemist who analyzed and identified it as such. This Court affirmed the ensuing conviction.

In the present case, as has been pointed out, a statement which would have been inadmissible on the authority of *Miranda* v. *Arizona*, 384 U. S. 436, had it been offered in the People's direct case was, for that reason, not offered on the direct case. Rather, it was held back, and when the petitioner testified in his own defense he made statements which were at significant variance with that statement, and at that point only, and for the first time, he was cross-examined by the prosecutor who asked him, a question at a time, whether he recalled having been asked a given question from the statement and having given such and such answer. He consistently denied familiarity with both question and answer, and to a very large extent, therefore, he, as much as the prosecutor, determined the scope of the impeachment the statement was used to provide.

The respondent would respectfully urge upon this Court that its failure to affirm the instant case is not only a complete repudiation of *United States* v. *Walder, supra,* but, more, a statement that *Walder* never was good law. To

begin with, we know that before *Walder,* United States Government agents were prohibited from conducting unlawful searches and seizures upon pain of having such evidence suppressed and rendered of no value to them, *United States* v. *Jeffers,* 342 U. S. 48. Yet little more than two years after *Jeffers, Walder* was decided, and in view of the proximity in time of the two cases there seems no option but to believe that this Court deliberately endorsed the use to impeach credibility of unconstitutionally secured evidence.

Turning, then, to the use of statements to impeach a defendant's credibility rather than tangible evidence, one comes to that line of cases exemplified by *United States* v. *Curry,* 358 F. 2d 904, which decision is in all ways faithful to the *Walder* precept. It deserved this Court's endorsement, and it received it in the form of a denial of certiorari, *Curry* v. *United States,* 385 U. S. 873. We make free to say that it deserved such endorsement, because both cases exemplify the same rule: unconstitutionally secured evidence is proscribed, except for purposes of impeachment, and that precept governs, whether the evidence is acquired in violation of the Fourth Amendment (*Walder*) or the Fifth (*Curry*).

Then this Court decided *Miranda* v. *Arizona, supra,* and beginning with *Groshart* v. *United States,* 392 F. 2d 172, a great many of the Federal Courts of Appeals and several of the highest courts of the states started an unceremonious, if not headlong, retreat away from the eminently sound logic of *Curry* towards the dictum expressed in *Miranda,* that evidence, even though contained in exculpatory statements, was inadmissible against the defendant. Where we take issue with this point of view is in the interpretation of *Miranda.* It is our submission to the Court that *Miranda* represents simply a new and heightened gauge of voluntariness. The *Mallory* rule (*Mallory* v. *United States,* 354 U. S. 449) and others setting standards which must be achieved

to hold a confession voluntary remain in force. They have only been joined by the *Miranda* rule which establishes additional standards which must be met before a confession may be deemed voluntary. If these and the other standards are not met, then, of course, any confession which results in that situation is involuntary and may not be used against the defendant.

In that view of the matter, there is no valid point of distinction between a pre-*Miranda* and a post-*Miranda* statement for the end result of any inquiry into each will be a determination that it is or is not voluntary and, as a necessary adjunct to that, an adjudication that it is admissible or inadmissible against the defendant. But having come to that evaluation of it, the trial court is in the same fix as was the trial court in *Curry:* may an involuntary statement, one, by definition, secured by means of the violation of his Fifth Amendment privileges, be used to impeach the defendant? *Curry* followed *Walder,* but the *Groshart* Court, by following *Miranda* and coming to a divergent result, has in effect said that there is some special mystique which attaches to an oral or written statement by reason of the *Miranda* dictum (which, of course, has no application to physical evidence) which makes the statement and the tangible evidence distinguishable and permits the use of the latter for impeachment purposes but forbids the use of the former.

The United States Court of Appeals for the Second Circuit recognized the dilemma thus presented in *United States* v. *Fox,* 403 F. 2d 97, and of it the Court said:

> "We express no view on the continued viability of *Walder* on its facts, but we are clear that in the light of *Miranda* it is no longer controlling in cases like that at bar." p. 101, footnotes omitted.

The objection to the *Walder-Miranda* conflict more bluntly stated is that, for so long as both continue to be authori-

tative, there will remain this vast disproportion in the extent to which the rights of an individual are enforced under the Fourth Amendment as opposed to the Fifth. That this lopsidedness ought not to be permitted to go on hardly has to be stated, but the question then becomes that of which to choose, the *Walder* holding or the *Miranda* dictum.

Critics of the *Walder* doctrine, and among them the instant petitioner, decry the fact that it inhibits their right to testify in their own defense. It simply doesn't, however. Certainly it prohibits their presentation to the court of a *perjurious* defense, but that, despite their disapprobation, is not a bad thing. The only defendant who has anything to fear from *Walder* is the one who proposes to take the witness stand and lie. The ironic thing is that if he even tells the same lies as he told in the statement (and we have never seen one without a few) it can't be used against him, even for impeachment purposes. The person cut most deeply by *Walder* is the defendant who moulds and remoulds his story to make it most completely responsive to the prosecution's case.

Neither is the factor of incrimination left in the case if *Walder* is followed, because, as was done in *Walder* and as was done here, it is carefully charged out of the case by the Court. The jury is told firmly and unmistakably that they may not consider the impeaching evidence against the defendant but may only use it in assessing his credibility. *Miranda,* on the other hand, uses the concept of incrimination as the very touchstone of its entire thesis and rationale. The opening paragraph of the opinion, the keynote of the whole thing, is:

> "The cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence: the restraints society must observe consistent with the Federal Constitution in prosecuting in-

dividuals for crime. More specifically, we deal with the *admissibility of statements* obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to *incriminate* himself." *Miranda* v. *Arizona*, *supra*, p. 439, emphasis added.

Consequently, if admissibility and incrimination are the hallmarks of *Miranda*, then there would certainly appear to be no mandate that it be applied to a situation in which a statement is neither admitted nor incriminating.

Finally, and much in the same vein, if one statement is to be admissible and incriminating, and another is to be inadmissible and non-incriminating, then there is a certain amount of good sense and sound policy in distinguishing between the methods by which they are secured. Certainly the former calls for more highly sophisticated safeguards than does the latter, and this consideration alone seems to recommend that the discriminating standards of *Miranda* as to the former type ought to be markedly relaxed as to the latter.

One final reason why, it is submitted, this present statement was properly utilized is the fact that when it was secured it was perfectly proper and lawful, because it was made by the petitioner before the decision in *Miranda*. As a matter of fact, it even conformed to the *Miranda* requirements in all save one particular; the petitioner was not advised that if he could not afford an attorney, one would be furnished for him without charge. It was not utilized at the trial of the case because *Johnson* v. *New Jersey*, 384 U. S. 719, fixed the application of *Miranda* to trials begun after June 13, 1966. Consequently, when the statement was taken in January of 1966, it was admissible, and it remained so for the next following five months until *Miranda*

was decided. Since *Johnson, supra,* the Court has decided *Stovall* v. *Denno,* 388 U. S. 293, and *Desist* v. *United States,* 394 U. S. 244, and in each of these has established as the cutoff date, the date the prohibited conduct was engaged in. If *Johnson* had adopted the same standard, which the Court has since suggested is a better one, *Jenkins* v. *Delaware,* —— U. S. ——, 89 S. Ct. 1677, 1680, n. 7, then this present statement would have retained its initial validity, and this whole problem would never have arisen.

POINT II

The Court of Appeals ruled correctly that no pretrial hearing on the voluntariness of the statement was necessary.

This Court's ruling in *Jackson* v. *Denno,* 378 U. S. 368, wrought a radical change in New York in the manner in which the voluntariness of a confession was decided, because prior to that time no pretrial adjudication of that question was possible. In obedience to the mandate of that opinion, the New York Court of Appeals thereafter decided *People* v. *Huntley,* 15 N. Y. 2d 72, and in that case set down the general procedure by which *Jackson* could most effectively be implemented. At the following session of the New York State Legislature, the *Huntley* procedure was adopted almost without change and became Sections 813-f, 813-g, 813-h, and 813-i of the New York Code of Criminal Procedure, effective July 16, 1965. Section 813-f, with which we are here specifically concerned, reads:

> § 813-f. *Confessions and admissions; notice before use.* In a case where the people intend to offer a confession or admission in evidence upon a trial of a defendant, the people must, within a reasonable time before the commencement of the trial, give written notice of such intention to the defendant, or to his counsel if he is represented by counsel.

It is the petitioner's argument that the prosecutor was compelled by this section to serve notice upon him in advance of trial so that the question of the voluntariness of the statement he gave to an assistant district attorney could be adjudicated. This section, it is submitted, has no relevance whatsoever to this case. To excerpt the operable language of the section, we see that such notification as the petitioner now claims entitlement to is necessary

> ". . . where the people intend to offer a confession or admission in evidence . . ."

In this case, the People were debarred from offering this statement in evidence by the then newly enunciated rule in *Miranda* v. *Arizona, supra.* In consequence, there wasn't, because there couldn't have been, an intention on the part of the People so to offer the statement, and as a necessary result of that fact, Section 813-f just did not apply. The statement, but for the entirely fortuitous fact that the petitioner testified, would never have become a part of the case. Even when he did testify, the statement was not admitted into evidence, at least in the conventional sense. It was marked as evidence, but only to preserve its identity for the appellate courts, and it was in all other respects treated as an exhibit for identification (cf. Petition, p. 5, ¶ 2).

Even in the long range view of the question and leaving aside the narrower ground that the wording of Section 813-f did not compel prior notice concerning the statement, such notice would have been a futile gesture. If we suppose that proper notice had been given, it is reasonable to believe, in the light of his present position, that the petitioner would have demanded the hearing required by the New York Code of Criminal Procedure, § 813-g. Without doubt that hearing would have been conducted, and, equally without doubt, the statement would have been ruled involuntary and hence inadmissible at the trial, because, as we

have already pointed out, it was deficient in terms of *Miranda.*

However, without having had recourse to that judicial process, the District Attorney's Office, because the defect is a glaring one, came to precisely the same conclusion, that it was involuntary and inadmissible, and of his own authority the District Attorney directed that it be so dealt with. As we have pointed out repeatedly, no allusion was made to it in the prosecution's direct case, and it was only when the petitioner testified that the statement re-entered the case.

As we attempted to demonstrate to the Court at Point I, *supra,* as long as *United States* v. *Walder, supra,* is viable law, the statement, even though inadmissible, is nonetheless a proper vehicle for the impeachment of the petitioner. In that frame of reference, it is wholly inconsequential whether its inadmissibility is ascertained and announced by a court or that conclusion is arrived at and adhered to by the prosecutor.

It is therefore submitted that from any point of view the petitioner was neither entitled to nor prejudiced by the absence of the Section 813-f notification.

POINT III

The petition should be denied.

Respectfully submitted,

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October 22, 1969.